Attachment 2
Proposed Redline Version of Draft Resolution ALJ-274

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-274
Administrative Law Judge Division
November 10, 2011

RESOLUTION

RESOLUTION ALJ-274. Establishes Citation Procedures for the Enforcement of Safety Regulations by the Consumer Protection And Safety Division Staff for Violations by Gas Corporations of General Order 112-E and Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199.

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1. Summary

This Resolution delegates specified authority to the Director of the Consumer Protection and Safety Division ~~Staff, or such other Staff as may be designated by the Executive Director,~~ to issue citations to all gas corporations to enforce compliance with General Order (GO) 112-E. GO 112-E contains specific rules governing the design, construction, testing, maintenance, and operation of utility gas gathering, transmission, and distribution pipeline systems and supplements compliance with the federal standards set forth in the Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199.

The citation program described herein delegates to ~~Staff[1]~~the Director of the Consumer Protection and Safety Division (Director of CPSD) the authority to draft and issue citations where the Director of CPSD has reason to believe that a gas corporation has ~~for violations~~ violated ~~of~~ GO 112-E and the Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199. We delegate to ~~Staff~~ the Director of CPSD the authority ~~to require immediate cure of the violations and~~ to levy fines for violations in the amounts prescribed for penalties by Public Utilities Code § 2107 and to issue compliance orders where the Director of CPSD has reason to believe that a gas corporation is engaging in conduct that violates GO 112-E and the Code of Federal Regulations, Title 49, Parts 190,

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~~[1] As used throughout this resolution, the term "Staff" refers to Consumer Protection and Safety Division Staff or such other Staff as may be designated by the Executive Director to carry out the particular functions involved.~~

191, 192, 193, and 199. Each violation is a separate and distinct offense and ongoing violations are separate and distinct offenses, consistent with Public Utilities Code § 2108.

The maximum penalty amount that the Director of CPSD can levy under this resolution is $1,000,000 for any related series of violations. If the Director of CPSD determines that the violation warrants a penalty amount in excess of $1,000,000, the Director of CPSD may ask the Commission to open an Order Instituting Investigation.

Penalty payments are the responsibility of shareholders of the investor-owned natural gas utilities and are not to be charged to ratepayers. This Resolution also sets forth the ~~appeal~~ hearing process for objecting to such citations or orders.

The citation program, as provided for in this resolution is similar to the enforcement programs adopted by the Pipeline and Hazardous Material Safety Administration (PHMSA) and the Office of State Fire Marshal (OSFM).

2. Jurisdiction and Authority

The Commission has broad regulatory authority, as set forth in Article XII of the California Constitution and § 701 of the Public Utilities Code.[2] Section 701 authorizes the Commission to "supervise and regulate every public utility in the State . . . and do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

> As mandated in § 702:
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> Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.
>
> Pursuant to § 451 each public utility in California must:
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> Furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment and facilities,… as are

[2] All statutory references are the Pub. Util. Code, unless otherwise noted.

> necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

Indeed, the Commission has stated that "[t]he duty to furnish and maintain safe equipment and facilities is paramount for all California public utilities.[3]

Pursuant to § 2101, the Commission is directed "to see that the provisions of the constitution and the statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed. . ."

Pursuant to § 768[4] and other relevant authority, the Commission has adopted, and at various times amended GO 112-E (Rules Governing Design, Construction, Testing, Maintenance, and Operation of Utility Gas Gathering, Transmission, and Distribution Piping Systems).

Pub. Util. Code § 7 allows the Commission to delegate certain tasks to Commission Staff. The Commission may lawfully delegate to its Staff the performance of certain functions, including the investigation of facts preliminary to agency action and the assessment of specific penalties for certain types of violations.[5] The primary purpose of an effective enforcement program should be to deter misbehavior or illegal conduct by utilities and other entities subject to Commission jurisdiction thereby ensuring that both the employees of the utility and the public it serves are properly protected from the inherent hazards of providing utility services. To increase the effectiveness of our safety program, it is reasonable to provide ~~our Staff~~ the Director of CPSD with an additional enforcement procedure to ensure that utilities adhere to their statutory and service obligations.[6]

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[3] Decision (D.) 11-06-017 at 16.

[4] In relevant part, § 768 provides that the Commission "may, after a hearing, require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public. . . The commission may establish uniform or other standards of construction or equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand."

[5] D.09-05-020 at 8.

[6] Our jurisdiction to create citation programs is well-established. We have adopted ~~similar~~ citation programs in several other areas. See Commission Resolutions E-4195 (resource adequacy), ROSB-002 (transportation), UEB-002 (telecommunication), USRB-001 (propane), and W-4799 (water and sewer).

The delegated authority we approve today is designed to allow the CPSD ~~our Consumer Protection and Safety Division (CPSD) Staff inspectors, or such other Staff as may be designated by the Executive Director,~~Director to issue citations as part of the Consumer Protection and Safety Division's ~~their~~ inspection duties in order to help ensure the safety of gas facilities and the utilities' operating practices. Such regulatory authority does not in any way diminish the utilities' primary responsibility in operating their facilities. As the Commission noted in D.61269:

> It is recognized that no code of safety rules, no matter how carefully and well prepared, can be relied upon to guarantee complete freedom from accidents. Moreover, the promulgation of precautionary safety rules does not remove or minimize the primary obligation and responsibility of respondents to provide safe service and facilities in their gas operations. Officers and employees of the respondents must continue to be ever conscious of the importance of safe operating practices and facilities and of their obligation to the public in that respect.[7]

3. GO 112-E

Pursuant to the requirements of Pub. Util. Code §§ 451 and 768, GO 112 was first adopted in 1960, in D.61269.[8] GO 112 prescribes the rules governing the design, construction, testing, maintenance, and operation of utility gas gathering, transmission and distribution piping systems. Over the years, GO 112 has been amended several times, and is now designated as GO 112-E, which incorporates by reference the Federal Pipeline Safety Regulations, specifically Title 49 of the Code of Federal Regulations (49 CFR), Parts 190, 191, 192, 193, and 199.[9] GO 112-E specifically states that "these rules do not supersede the Federal Pipeline Safety Regulations, but are supplements to the Federal Regulations."[10]

As stated in GO 112-E, Rule 102.1, "the purpose of these rules is to establish, in addition to the Federal Pipeline Safety Regulations, minimum requirements for the design, construction, quality of materials, locations, testing, operations, and maintenance of facilities used in the gathering, transmission, and distribution of gas and in liquefied natural gas facilities to safeguard life or limb, health, property and public welfare and to

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[7] D.61269, 58 CPUC 1st at 420.

[8] *Id.* at 413.

[9] D.95-08-053, 61 CPUC 2d at 190.

[10] GO 112-E, Rule 101.2.

provide that adequate service will be maintained by gas utilities operating under the jurisdiction of the commission." Rule 102.2 of GO 112-E states that the rules are "concerned with safety of the general public and employees' safety to the extent they are affected by basic design, quality of the materials and workmanship, and requirements for testing and maintenance of gas gathering, transmission and distribution facilities and liquefied natural gas facilities."

4. San Bruno Explosion and Independent Review Panel Report

On September 9, 2010, a portion of Line 132, installed, operated, and maintained by Pacific Gas and Electric Company (PG&E), ruptured in San Bruno, CA, and the ensuing explosion and fire killed eight people, injured many others, destroyed 38 homes, and damaged 70 additional homes. On September 23, 2010, the Commission issued Resolution L-403, which, among other things, established the Independent Review Panel to gather and review facts related to the San Bruno explosion and make recommendations for the safe management of PG&E's natural gas transmission lines.

In assessing the Commission's oversight authority, the Independent Review Panel recommended that "[t]he CPUC should seek to align its pipeline enforcement authority with that of the State Fire Marshal's by providing the CPSD staff with additional enforcement tools modeled on those of the OSFM [Office of State Fire Marshal] and the best from other states."[11] The Panel noted that Pipeline Safety Division of the OSFM has the authority to initiate and conclude enforcement actions and to assess civil penalties without initiating the same kind of formal processes and procedures that is currently required at the Commission.[12]

The OSFM model is similar to and is based on the model used for informal enforcement at the Pipeline and Hazardous Material Safety Administration (PHMSA). PHMSA is part of the United States Department of Transportation and its Office of Pipeline Safety administers the Department's national regulatory program to assure the safe transportation of natural gas, petroleum, and other hazardous materials by pipeline. The federal Office of Pipeline Safety develops regulations and other approaches to risk management to assure safety in design, construction, testing, operation, maintenance,

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[11] Independent Review Panel Report, Recommendation 6.7.3.1 at 104

[12] Pursuant to Government Code §§ 51010 *et seq.*, the OSFM has safety and enforcement jurisdiction over intrastate hazardous *liquid* pipelines. In particular, Government Code §§ 51018.6 *et seq* mandates that the State Fire Marshal shall adopt regulations for conducting enforcement proceedings and provides that violations may result in civil penalties of $10,000 per day that the violation exists, up to $500,000 per occurrence.

and emergency response of pipeline facilities.[13] Like OSFM, we model this citation program after PHMSA's enforcement regulations (*See* 49 CFR 190.201 to 49 CFR 190.225).

PHMSA is the federal agency broadly charged with overseeing safety of all interstate and intrastate pipelines, and is responsible for the federal rules which are incorporated into the Commission's GO 112-E. As provided by federal law, PHMSA has jurisdiction over intrastate pipeline facilities, while California and 47 other states regulate intrastate gas pipeline facilities through an annual certification program. As with most other states, California has adopted additional safety standards for pipeline facilities that are more stringent than the federal requirements.

5. National Transportation Safety Board Recommendations

On August 30, 2011, the National Transportation Safety Board (NTSB) adopted its Pipeline Accident Report on the rupture of PG&E's Line 132, which included findings, the probable cause of the San Bruno explosion and several recommendations.[14] The NTSB strongly recommends that the Governor of the State of California expand the Commission's Pipeline Safety Division staff enforcement authority and ensure that Commission staff has the authority to issue fines and penalties. The Resolution we adopt today is consistent with both the NTSB's and the Independent Review Panel's recommendations.

6. Delegation of Authority to Commission Staff

We hereby delegate to ~~Staff~~ the Director of CPSD the authority to issue citations for violations and to ensure that immediate hazards to public safety are addressed and repaired without delay. These actions will significantly expand the enforcement tools available to ~~our Staff~~ the Consumer Protection and Safety Division and should help to ensure prompt correction of potential safety violations. We find it is reasonable and necessary to delegate to ~~Staff~~ the Director of CPSD the ability to issue citations to any gas corporation for violations of GO 112-E and CFR, Title 49, Parts 190, 191, 192, 193, and 199.

This Resolution gives the ~~Staff~~ Director of CPSD the authority to issue a written citation to any gas corporation, stating the specific violation, the amount of ~~the fine~~any civil penalty, any compliance order, and information about how to ~~appeal~~ seek a

[13] See generally, http://www.phmsa.dot.gov/portal/site/PHMSA.

[14] NTSB's Report was posted on its website on September 26, 2011: http://www.ntsb.gov/doclib/reports/2011/PAR1101.pdf

hearing on the citation or compliance order, pursuant to the procedures provided ~~herein~~in Appendix A. ~~Staff~~ Prior to issuing a citation, the Director of CPSD must issue a warning letter, notifying the gas corporation (Respondent) of the probable violation and advising the gas corporation to correct the violation within a specified period of time, not to exceed 30 days, or be subject to a written citation and fine. The gas corporation receiving the warning letter must respond to the Director of CPSD within 14 days, acknowledging receipt of the letter and stating the steps it intends to take to remedy the probable violation or submitting a written explanation, information or other material to show that no probable violation has occurred.

Following the issuance of a warning letter, ~~T~~the Director of CPSD has the authority to issue ~~such~~ a ~~written~~ citation should the Respondent fail to respond to the warning letter, fail to correct the probable violation or fail to provide a sufficient written explanation, information or other material to show that no probable violation has occurred. The information required to be included in the written citation is ~~and require that the violation be cured at, or soon after, the time Staff identifies a violation. So long as the violation does not pose an immediate safety hazard, the citation will provide a time period not to exceed seven calendar days from the date of issuance for the utility to cure the violation and either pay the penalty or file a Notice of Appeal. The procedures for issuing citations and for filing a Notice of Appeal are~~ set forth in Appendix A and shall include the amount of the civil penalty proposed and the maximum civil penalty for which the gas corporation is liable under law. As provided for in §2107, the penalty amount shall not be less than five hundred dollars ($500) nor more than fifty thousand dollars ($50,000) for each offense. ~~Each citation will assess the maximum penalty amount provided for by § 2107.~~ Pursuant to § 2108, each violation is a separate and distinct offense; to the extent that a violation is ongoing, each day's continuance is a separate and distinct citable offense. The Director of CPSD, however, may not levy under this Resolution a total civil penalty in excess of $1,000,000 for any related series of violations. If the Director of CPSD determines that the violation warrants a penalty amount in excess of $1,000,000, the Director of CPSD may ask the Commission to open an Order Instituting Investigation.

The Director of CPSD may additionally issue an order directing compliance if the nature of the probable violation and the public interest warrant such an order.

Payment of a citation or ~~filing an appeal~~ requesting a hearing does not ~~excuse the utility from curing the violation, nor does it~~ prevent the Commission from taking other remedial measures, including, but not limited to, (i) issuing corrective orders and other compliance orders, such as an expedited order to show cause, and (ii) issuing an order instituting investigation in the event the underlying violation is unresolved or becomes part of a pattern and practice of unresolved violations. Any civil penalty amount issued

by the Commission through other remedial measures is to be reduced by any civil penalty amount paid by the Respondent pursuant to this resolution. Any compliance order issued by the Commission supersedes any compliance order issued by the CPSD director under this Resolution.

The Commission's regulatory mandate is to ensure that utilities provide safe and reliable service at reasonable rates; authorizing ~~Staff~~ the Director of CPSD to issue citations as provided for in this resolution and Appendix A is necessary to fulfill that mandate. ~~We require that the utilities cure any violations within no more than seven calendar days and we establish fines at the maximum level to protect the public interest, as well as to ensure compliance with the Commission's orders and the Public Utilities Code. We provide the opportunity to request a one-time extension of no more than seven additional days to cure the cited violation, provided that the request is made within three calendar days of the date the citation is issued and is supported by an affidavit from the Respondent's Chief Executive Officer stating that in the Respondent's best judgment, the extension will not affect the safety or integrity of the operating system or endanger public safety.~~

Nothing in the citation program we approve today interferes with the utilities' requirements to maintain and operate their systems safely, including invoking any necessary emergency response procedures to address immediate safety hazards, or any other procedures necessary to ensure that immediate safety hazards are promptly corrected. To the extent that Consumer Protection and Safety Division ~~Staff~~ discovers violations that constitute immediate safety hazards, pursuant to § 702, ~~Staff~~ the Consumer Protection and Safety Division has existing authority to ensure that those violations are promptly corrected. The citation program we approve today is cumulative to all other applicable provisions of state and federal law that provide for sanctions against violators, including but not limited to §§ 2112 and 2113, and does not affect or limit the tort liability of the gas system operator.

The citation program provided for above and in Appendix A applies to all gas corporations subject to the Commission's jurisdiction.

Notice and Comment

A draft of this Resolution was issued to jurisdictional gas utilities and other interested parties in accordance with Section 311 of the Public Utilities Code. Comments were allowed under Rule 14.5 of the Commission's Rules of Practice and Procedure. Comments were filed by _____ and reply comments were filed by _____.

Findings

1. Pub. Util. Code § 701 authorizes the Commission to supervise and regulate every public utility in the State.
2. Pub. Util. Code § 702 mandates every public utility to obey and promptly comply with every Commission order, decision, direction, or rule.
3. Pub. Util. Code § 2101 directs the Commission to see that the provisions of the State constitution and statues dealing with public utilities are addressed and obeyed.
4. California law, including Pub. Util. Code § 7, authorizes the commission to delegate certain powers ~~to its Staff~~, including the investigation of acts preliminary to agency action, and the issuance of citations for certain types of categories of violations up to specified amounts.

~~5. The citation program for gas corporations, as provided for above and in Appendix A, is necessary to ensure, effective, prompt, and efficient enforcement of Commission decisions and orders.~~

5. We find it is reasonable and necessary to delegate to the Director of CPSD the ability to issue citations to any gas corporation for violations of GO 112-E and CFR, Title 49, Parts 190, 191, 192, 193, and 199.
6. The citation program, as provided for above and in Appendix A, is similar to the ~~citation~~ enforcement programs ~~previously~~ adopted by ~~the Commission for other utilities~~PHMSA and the OFSM.
7. The Commission believes ~~T~~the citation program, as provided for above and in Appendix A, ~~is reasonable, and~~ will facilitate achieving compliance with Commission decisions and orders to protect public safety and to deter future violations.

~~8. It is reasonable to assess penalties for each violation at the maximum the amounts set forth in Pub. Util. Code § 2107; this approach is consistent with the Commission's broad regulatory powers to protect public safety and to ensure compliance with the Commission's orders and the Public Utilities Code.~~

~~As set forth in Pub. Util. Code § 2108, each violation is a separate and distinct offense; to the extent that a violation is ongoing, each day's continuance is a separate and citable offense.~~

~~9. The Commission needs the flexibility for its Executive Director to designate CPSD Staff or such other Staff who may be most appropriate to carry out the various functions involved in the citation program described in this Resolution.~~

~~10. The gas pipeline citation program should allow a Respondent to appeal Staff Director of CPSD issued citations.~~

~~11.~~8. ~~Payment of a citation or filing an appeal does not excuse the gas corporation from promptly curing cited violations, and does not preclude the Commission from taking other remedial measures.~~

~~12.~~9. ~~Penalty payments are the responsibility of shareholders of the gas corporation and shall not be charged to ratepayers.~~

~~13.~~10. Nothing in the citation program we approve today interferes with the gas corporations' requirements to maintain and operate their systems safely, including invoking any necessary emergency response procedures to address immediate safety hazards, or any other procedures necessary to ensure that immediate safety hazards are promptly corrected.

~~14.~~11. To the extent that ~~Staff~~ Consumer Protection and Safety Division discovers violations that constitute immediate safety hazards, pursuant to § 702, ~~Staff~~ the Consumer Protection and Safety Division has existing authority to ensure that violations are promptly corrected.

THEREFORE, IT IS ORDERED that:

1. The Commission delegates authority to the Director of the Consumer Protection and Safety Division ~~Staff, or such other Staff as may be designated by the Executive Director,~~ to issue citations to and to levy fines on gas corporations to enforce compliance with General Order 112-E and the Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199, under the procedures contained in Appendix A.
2. The Citation Procedures and ~~Appeals~~ Hearing Process set forth in Appendix A is hereby adopted to govern the issuance and ~~appeal~~ hearing process for ~~of~~ citations for violation of statutes, orders, or rules relating to investor-owned natural gas utilities for civil penalty amounts less than $1,000,000. If the Directors of CPSD determines that the violation warrants a penalty amount in excess of $1,000,000, the Director of CPSD must use the Commission's existing Order Instituting Investigation Process.
3. Prior to issuing a written citation, the Director of CPSD must issue a warning letter, notifying the gas corporation (Respondent) of the probable violation and

advising the gas corporation to correct the violation within a specified period of time, not to exceed 30 days, or be subject to a written citation and fine. The gas corporation receiving the warning letter must respond to the Director of CPSD within 14 days, acknowledging receipt of the letter and state the steps it intends to take to remedy the probable violation or submit a written explanation, information or other material to show that no probable violation has occurred.

4. If Respondent is unable to correct the violation within the time period specified by the Director of CPSD in the Warning Letter, Respondent may request additional time to remedy the violation. The request must be accompanied by a written explanation, information or other material to show why additional time is needed.

5. The Director of CPSD shall grant the additional time to remedy the violation if the Respondent has provided sufficient information to show why the additional time is needed. If the grant of additional time poses a threat to public safety, the CPSD can impose interim remedial measures.

~~3.~~6. Penalty payments are the responsibility of shareholders of the gas corporations and shall not be charged to ratepayers.

~~4. Gas corporations shall cure any cited violation within seven calendar days or request a one-time extension of no more than seven calendar days, pursuant to the procedures described in Appendix A, Section C.1.a-c. Payment of a penalty or submitting a Notice of Appeal does not exempt the utility from curing the cited violation. Violations that constitute immediate safety hazards may require correction within a shorter timeline.~~

This resolution is effective today.

I hereby certify that this Resolution was duly introduced, passed, and adopted by the Public Utilities Commission of the State of California at its regular business meeting held on _____. The following Commissioners approved it:

_____

PAUL CLANON
Executive Director

Attachment 3
Proposed Redline Version of Appendix A to Draft Resolution ALJ-274

Appendix A
Citation Procedures and Appeal Process

I. Warning Letters

A. Upon determining that a probable violation of GO 112-E and CFR, Title 49, Parts 190, 191, 192, 193, and 199, the Director of the Consumer Protection and Safety Division (Director of CPSD) may issue a Warning Letter notifying the gas corporation (Respondent) of the probable violation, specifying the nature of the probable violation and the GO violation and/or Code provisions violated, and advising the Respondent to correct the violation within a specified period of time, not to exceed 30 days, or be subject to a citation under Resolution ALJ-274.

B. Respondent must respond to the Director of CPSD's Warning Letter within 14 days. Respondents response must acknowledge receipt of the Warning Letter and:

1. State the steps it intends to take to remedy the probable violation or
2. Submit a written explanation, information or other material to show that no probable violation has occurred.

C. If Respondent is unable to correct the violation within the time period specified by the Director of CPSD in the Warning Letter, Respondent may request additional time to remedy the violation. The request must be accompanied by a written explanation, information or other material to show why additional time is needed.

D. The Director of CPSD shall grant the additional time to remedy the violation if the Respondent has provided sufficient information to show why the additional time is needed. If the grant of additional time poses a threat to public safety, the CPSD can impose interim remedial measures.

E. The Director of CPSD may invoke any necessary emergency response procedures to address immediate safety hazards to ensure that immediate safety hazards are promptly corrected.

II. Citation Procedures

A. ~~Contents of Citation~~Following the issuance of a Warning Letter, the Director of CPSD can issue Citation should the Respondent:

1. Fail to respond to the Warning Letter;

2. Fail to correct the probable violation within the time provided for in I(A) or (D) above.; or
3. Fail to provide a sufficient written explanation, information or other material to show that no probable violation has occurred.

B~~1~~.Contents of Citation: A Notice of Citation shall include:

1. Statement of the provisions of the laws, regulations or orders which Respondent is alleged to have violated and a statement of the evidence upon which the allegations are based;
2. Notice of response options available to the Respondent under Section II.F below.
3. If a civil penalty is proposed, the amount of the proposed civil penalty and the maximum civil penalty for which Respondent is liable under law;
4. If a civil penalty is proposed, the factors the Director of CPSD considered under Section IV. below; and
5. If a compliance order is proposed, a statement of the remedial action being sought in the form of a proposed compliance order.

C. The Director of CPSD may not issue a citation under this section if he/she proposes a civil penalty amount in excess of $1,000,000 for any related series of violations.

~~A specification of each alleged violation, including citation to the portion of General Order 112-E (including, where relevant, citation to the specific rule in CFR, Title 49, Parts 190, 191, 192, 193, and 199) allegedly violated;~~

~~2. A statement of the facts upon which each alleged violation is based;~~

~~(a) While the citation need not include all supporting evidence, Staff will make the evidence available for timely inspection upon request by the Respondent;~~

~~3. The amount of the fine;~~

~~4. A statement that the Respondent shall cure the violation and, in addition, may pay the amount of the fine set forth in the citation, or appeal the citation and deposit the penalty amount in escrow with the Commission's Fiscal Office, and that the Respondent will forfeit the right to appeal the citation by failing to do one of these things within seven calendar days;~~

~~5. A Citation Payment Form;~~

~~6. An explanation of how to file an appeal, including the Respondent's right to have a hearing, to have a representative at the hearing, to request a transcript, and to request an interpreter; and~~

~~7. A form for Notice of Appeal.~~

~~B~~E. Service of Citation.

1. Service of the ~~c~~Citation shall be effected ~~either personally in the field or to an officer of the Respondent~~ by electronic mail or by first-class mail.

2. Citations served by first class mail may be sent to the Respondent's business address, or the address for the service of process of the Respondent has on file with the Secretary of State of California.

~~3. On the same date that Staff serves a citation in the field, Staff must also serve a copy of citations issued in the field to an officer of the Respondent at the Respondent's business address.~~

~~4. For electronic mail, S~~service is effective upon the date the citation is ~~sent~~ personally in the field or on the Respondent by electronic mail ~~or first-class mail. For service of the citation by first class mail, the effective date of the citation is three days after the date it was mailed.~~

~~C~~F. Response to Citation

1. Within 30 days of receipt of a Citation, the respondent shall respond to the Director of CPSD in the following way:
   a. When the notice contains a proposed civil penalty:

(1) Pay the proposed civil penalty and close the case with prejudice to the Respondent;
(2) Submit written explanations, information or other materials in answer to the allegations or in mitigation of the proposed civil penalty; or
(3) Request a hearing.

2. When the notice contains a proposed compliance order:
(1) Agree to the proposed compliance order;
(2) Object to the proposed compliance order and submit written explanations, information or other materials in answer to the allegations in the notice of probable violation; or
(3) Request a hearing.
3. Failure of Respondent to respond in accordance with paragraph (1) of this section or, when applicable paragraph (2) of this section, constitutes a waiver of the right to contest the allegations in the notice of probable violation and authorizes the Director of CPSD, without further notice to the Respondent, to find facts to be as alleged in the Citation, and to issue a Final Order.

~~1. Within seven calendar days after the date of service of the citation, Respondent shall cure the violation or request a one-time extension of time to do so. In addition, Respondent shall remit payment of the full amount of the fine, as set forth in Section I.D.1, with notice to Staff, or submit and serve a Notice of Appeal, as set forth in Section II, below.~~

~~a. Respondent may pay the fine and request a one-time extension of no more than seven calendar days to cure the violation, provided that the request for extension is made within three calendar days of the date of service of the citation and is supported by an affidavit from the respondent's Chief Executive Officer stating that in the respondent's best judgment, the extension to cure the violation will not affect the safety or integrity of the operating system or endanger public safety.~~

~~b. The affidavit described in Section II.C.a. shall include:~~

~~(1) The name of the person and that person's position that the Chief Executive Officer relied upon for this declaration, and~~

~~(2) An explanation of why the extension to cure the violation will not affect the safety or integrity of the operating system or endanger public safety.~~

~~c. The Director of CPSD or the Executive Director may consider and grant or deny such a request. No further requests for extensions of time to comply will be granted.~~

~~2. Unless otherwise specified, a requirement to notify Staff or serve Staff means to send a written communication by first-class mail or an express mail service to the address specified in the citation.~~

~~a. These written communications are not filed with the Commission's Docket Office.~~

~~b. Staff may specify an e-mail address in order to allow electronic submissions in addition to, or instead of, communications by mail service,~~

~~D. Payment of fine; default.~~

~~1. All cited violations must be cured, as set forth in Section I.C.1. Payment of fines shall be submitted to the Commission's Fiscal Office, 505 Van Ness Avenue, San Francisco, CA 94102, in the form of certified check, payable to the California Public Utilities Commission.~~

~~a. The respondent shall include the citation number and shall include a completed Citation Payment Form.~~

~~b. Upon payment, the fine will be deposited in the State Treasury to the credit of the State General Fund.~~

~~2. If Respondent pays the full amount of the fine within the time allowed, the citation shall become final.~~

~~3. Failure to pay the full amount of the fine or to file a Notice of Appeal will place Respondent in default, the citation shall become~~

~~final, and the Respondent will have forfeited its right to appeal the citation. A late payment is subject to a penalty of 10 percent per year, compounded daily and to be assessed beginning the calendar day following the payment-due date.~~

III. ~~Appeal~~Request for Hearing.

A. ~~If Respondent wishes to appeal a citation, Respondent shall submit a Notice of Appeal of Citation to the Director of CPSD.~~ If Respondent requests a hearing pursuant to II.F(1)(3) or II.F(2)(3) above, the request for a hearing must be accompanied by a statement of the issues that the Respondent intends to raise at the hearing. The issues may relate to the allegations in the notice, any proposed corrective action, or the proposed civil penalty amount. A Respondent's failure to specify an issue may result in waiver of that issue at the hearing.

1. Respondent/Appellant ~~must submit a Notice of Appeal of Citation within seven calendar days from the date service of the citation is effected, and~~ shall serve the Request for Hearing on the Director of CPSD, the Commission's Executive Director, the Chief Administrative Law Judge (ALJ), the General Counsel, and the Director of the Division of Ratepayer Advocates. The Director of CPSD shall promptly notify the Chief ALJ of the ~~Notice of Appeal~~Request for Hearing.

~~1.~~2. The hearing will be an adjudicatory proceeding. For purposes of the hearing, the Director of CPSD will be the complainant.

~~2. Submitting a Notice of Appeal does not excuse the Respondent from curing the violation described in the citation. The Respondent/Appellant must deposit the penalty amount with the Commission's Fiscal Office, to be held in escrow until the appeal is resolved. The appeal must explain with specificity each and every ground for the appeal.~~

B. Unless specified in this subpart of Appendix A, the procedures for hearings under this subpart will conform to Article 13 of the

Commission's Rules of Practice and Procedure. ~~Upon being notified of the Notice of Appeal by the Director of CPSD, the Chief ALJ shall promptly designate an ALJ to hear the appeal.~~

C. The ~~assigned ALJ~~Presiding Officer shall set the matter for hearing promptly. The Respondent~~/ Appellant and Staff~~ and the CPSD Director will be notified at least ten days in advance of the time, date and place for the hearing. The ~~ALJ~~ Presiding Officer may, for good cause shown or upon agreement of the parties, grant a reasonable continuance of the hearing.

D. ~~Any appeal of a citation~~The hearing shall be heard in the Commission's courtroom in San Francisco or Los Angeles, at the discretion of the Commission.

E. Upon a good faith showing of language difficulty, the Respondent will be entitled to the services of an interpreter at the Commission's expense upon written request to the ~~assigned ALJ~~Presiding Officer and the Public Advisor's Office not less than three business days prior to the date of the hearing.

~~F. The Respondent/Appellant may order a transcript of the hearing, and shall pay the cost of the transcript in accordance with the Commission's usual procedures.~~

~~G. Staff has the burden to prove a prima facie case supporting its issuance of the citation for the alleged violation; the burden then shifts to Respondent/Appellant to demonstrate that a violation did not occur and the citation should not issue.[1]~~

H. Respondent may be represented at the hearing by an attorney or other representative, but such representation shall be at the Respondent's sole expense. ~~Rule 13.6 (Evidence) of the Commission's Rules of Practice and Procedure is applicable.~~

~~I. Ordinarily, the appeal will be submitted at the close of the hearing. Upon a showing of good cause, the ALJ may keep the record open for a reasonable period to permit a party to submit additional evidence or argument.~~

~~[1] As most recently stated in D.11-09-006, "[t]he duty to furnish and maintain safe equipment and facilities falls squarely on California public utilities, including PG&E. The burden of proving that particular facilities are safe also rests with PG&E." (D.11-09-006 at 6.)~~

J. Article 14 and Rule 15.5 of the Commission's Rules of Practice and Procedure shall apply to the Presiding Officer's decision and any appeal of that decision. ~~Within 60 days after the appeal is submitted, the ALJ will issue a draft resolution resolving the appeal. The draft resolution will be placed on the first available agenda, consistent with the Commission's applicable rules. Parties may file comments on the draft resolution pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure.~~

K. A Commission decision ~~resolution approved by the Commission~~ is subject to rehearing pursuant to Public Utilities Code Section 1731 and to judicial review pursuant to Public Utilities Code Section 1756.

L. ~~During the period described in the next sentence, none of the following may communicate regarding the appeal, orally or in writing, with a Commissioner, Commissioner's advisor, Chief ALJ, Assistant Chief ALJ, or assigned ALJ: the Respondent, the Staff that issued or is enforcing the citation, or any agent or other person on behalf of the Respondent or such Staff.~~

~~1. This prohibition applies from the date of service of the citation and extends to and includes the date when the period to apply for rehearing of the Commission resolution on the appeal has expired and no application for rehearing has been filed, or if an application for rehearing is filed, the date when the period to seek judicial review of the decision finally resolving the application for rehearing has passed without any party seeking judicial review; or if judicial review is sought, the date any court cases are resolved.~~

~~2. Inquiries strictly limited to procedural matters are permitted.~~ The Commission's rules on ex-parte communications in adjudicatory proceedings shall apply.

IV. Penalty Amount Considerations

A. In determining the amount of a civil penalty under this resolution, the Director of CPSD shall consider:

1. The nature, circumstances and gravity of the violation, including adverse impact on the environment;
2. The degree of the Respondent's culpability;
3. The Respondent's history of prior offenses;

4. The Respondent's ability to pay;

5. Any good faith by the Respondent in attempting to achieve compliance;

6. The effect on the Respondent's ability to continue in business; and

B. The Director of CPSD may consider:

1. The economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages; and

2. Such other matters as justice may require.

C. These same factors shall apply to the Presiding Officer in any hearing on the matter.

V. Payment of Penalty

A. Payment of a civil penalty assessed in a Final Order must be made within 20 days after receipt of the Final Order.

B. For purposes of this subpart, Final Order shall mean:

1. Respondent's response to a Citation under Section I.F.1(a)(1) above;

2. Failure of Respondent to respond to a Citation under Section I.F.3 above;

3. 30 days after a Commission decision if no application for rehearing is made; or

4. A Commission decision affirming a civil penalty after a request for rehearing.

(END OF APPENDIX A)

Minkin Comment Resolution ALJ-274 Service List

Attachment 4
Subject Index of Proposed Changes

Subject	Proposed Change(s)
Jurisdiction and Authority	While this section of the Resolution cites to D.09-05-020 as support for the Commission's authority to delegate the "the performance of certain functions, including the investigation of facts preliminary to agency action and the assessment of specific penalties for certain types of violations," Draft Resolution ALJ-274 goes far beyond this precedent and is an unlawful delegation of powers. In D.09-05-020, the Commission established a very specific enforcement framework that detailed specific prescriptive violations and corresponding limited penalty amounts. Those limited penalty amounts are much lower than the maximum penalty amounts allowed under the Public Utilities Code and more appropriately correspond to the severity of the infraction. In contrast, Draft Resolution ALJ-274 purports to delegate authority to Staff to assess maximum statutory penalties for violations of numerous Federal Code provisions, many of which are performance-based, rather than prescriptive. Implementation and enforcement of performance-based regulations inherently requires the exercise of a great deal of interpretation and discretion. SoCalGas and SDG&E sought an extension of time to prepare comments on Draft Resolution ALJ-274 in order to try to develop an approach that would be consistent with D.09-05-020, but that request for additional time was denied. A lawful delegation of authority would, at a minimum, require the development of a detailed, prescriptive list of violations, as was adopted in D.09-05-020. In the timeframe allotted for comments on the Draft Resolution, it is not possible to come up with a detailed, prescriptive framework for violations of GO-112-E and the underlying federal regulations, as was established in D.09-05-060. As such, SoCalGas and SDG&E have developed a proposal that they can support, but may well still exceed the scope of lawful delegation of Commission authority: Modify the Draft Resolution to delegate authority to the Director of the CPSD. This better ensures consistency and uniformity in the enforcement process and reduces the risk that the Commission has exceeded its delegation authority. In addition, the Commission cannot lawfully delegate its delegation powers to determine who may issue citations under the Draft Resolution to the Executive Director of the Commission, as Draft Resolution ALJ-274 purports to do. Modify Draft Resolution ALJ-274 to limit the maximum amount of penalties imposed for a related series of events to $1,000,000.

	Limiting the fining authority is consistent with OSFM and PHMSA. Adopt standards to guide the Director of the CPSD's determination of appropriate penalty amounts. Specifically, require the Director of the CPSD to consider the following factors in proposing a penalty: (1) the nature, circumstances and gravity of the violation, including adverse impact on the environment; (2) the degree of Respondent's culpability; (3) Respondent's history of prior offenses; (4) Respondent's ability to pay; (5) any good faith by Respondent in attempting to achieve compliance; and (6) the effect on Respondent's ability to continue in business. The Commission should further authorize, but not require, the Director of the CPSD to consider the following factors: (1) the economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages; and (2) such other matters as justice may require. These factors are identical to those found in PHMSA's enforcement regulations. In addition, provide cited parties with a meaningful opportunity to request a pre-deprivation hearing on all issues, not just the issue of whether a violation occurred. The Draft Resolution violates due process by (1) depriving parties of the right to a pre-deprivation hearing; and (2) limiting the scope of the cited party's right to an administrative appeal to the issue of a whether a violation occurred (thereby depriving parties of the ability to seek Commission review of the imposition of, or amount of, penalties). The Commission cannot lawfully abdicate its obligation to conduct a review of the penalty amounts as required under Public Utilities Code section 2104.5.
GO 112-E	No proposed changes.
San Bruno Explosion and Independent Review Panel Report	The Commission's graduated enforcement process should be modeled after PHMSA's. Note that the OSFM's enforcement process, of which the Independent Review Panel was supportive, is also modeled after the PHMSA process.
National Transportation Safety Board	No proposed changes.
Delegation of Authority to Commission Staff	See discussion of Jurisdiction and Authority above.

Attachment 5

Table of Authorities

CASES (FEDERAL AND STATE)

Attachment 5

FEDERAL REGULATIONS

CPUC DECISIONS

CALIFORNIA STATUTES

CALIFORNIA REGULATIONS